

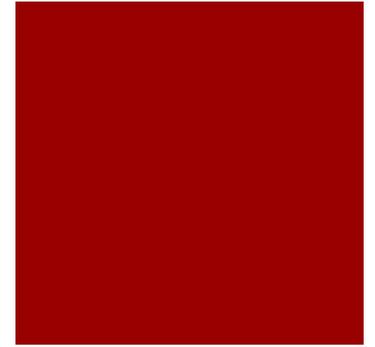
Managing Performance

Annette Gumbs



ST JOHNS
BUILDINGS
BARRISTERS CHAMBERS

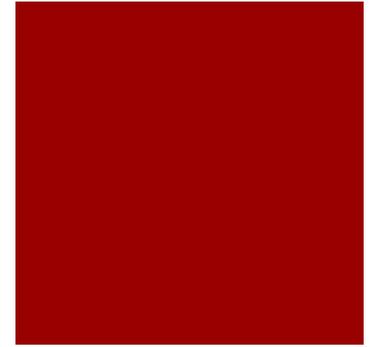
Managing Performance



- How do you overcome the perpetual worry of managing performance when there is an ongoing disability or propensity to claim discrimination?

Start with the end in mind

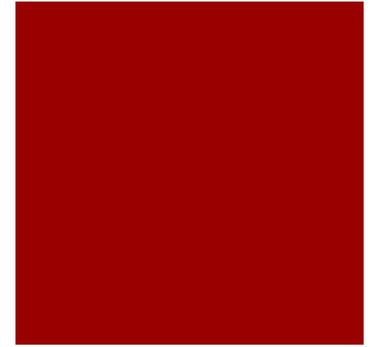
Objectives



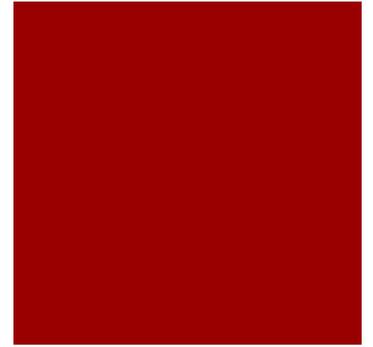
- Turn performance around
- Fast exit (but not too fast)
- Dignified for all concerned?
- Most importantly - **withstand after the event scrutiny by a Tribunal**
- **Remember**
 - A Tribunal can't substitute its view of facts for the employers if they have acted reasonably and within the range of reasonable response.

Plan for today

- Reminder as to key points in demonstrating a fair capability dismissal
- Getting your ducks in a row
 - Identifying the evidence to win your case.
- Things to watch out for when dealing with employees with actual or suspected disabilities

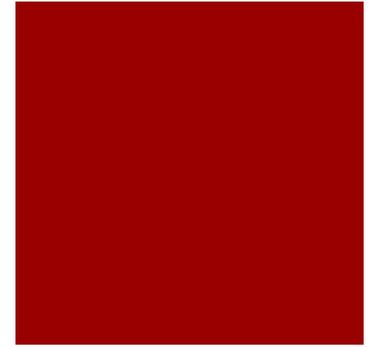


Capability dismissals - a reminder



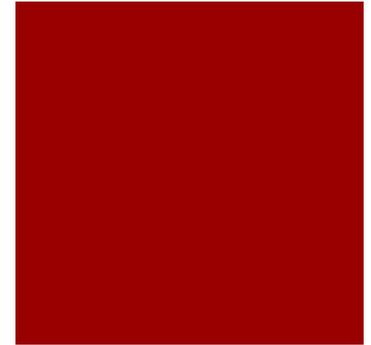
- Employer holds an honest belief
- Based on reasonable grounds
- That the employee is incapable

Evidence of poor performance



- Starting point –
 - Clear communication of expected standard of performance
- **Sources of evidence of poor performance**
 - Inherent?
 - Widget makers – number of widgets
 - Expressed targets
 - sales
 - Appraisal competencies
 - Customer complaints
 - Colleague complaints
 - Manager's opinion?
 - Only if supported by independently verifiable evidence

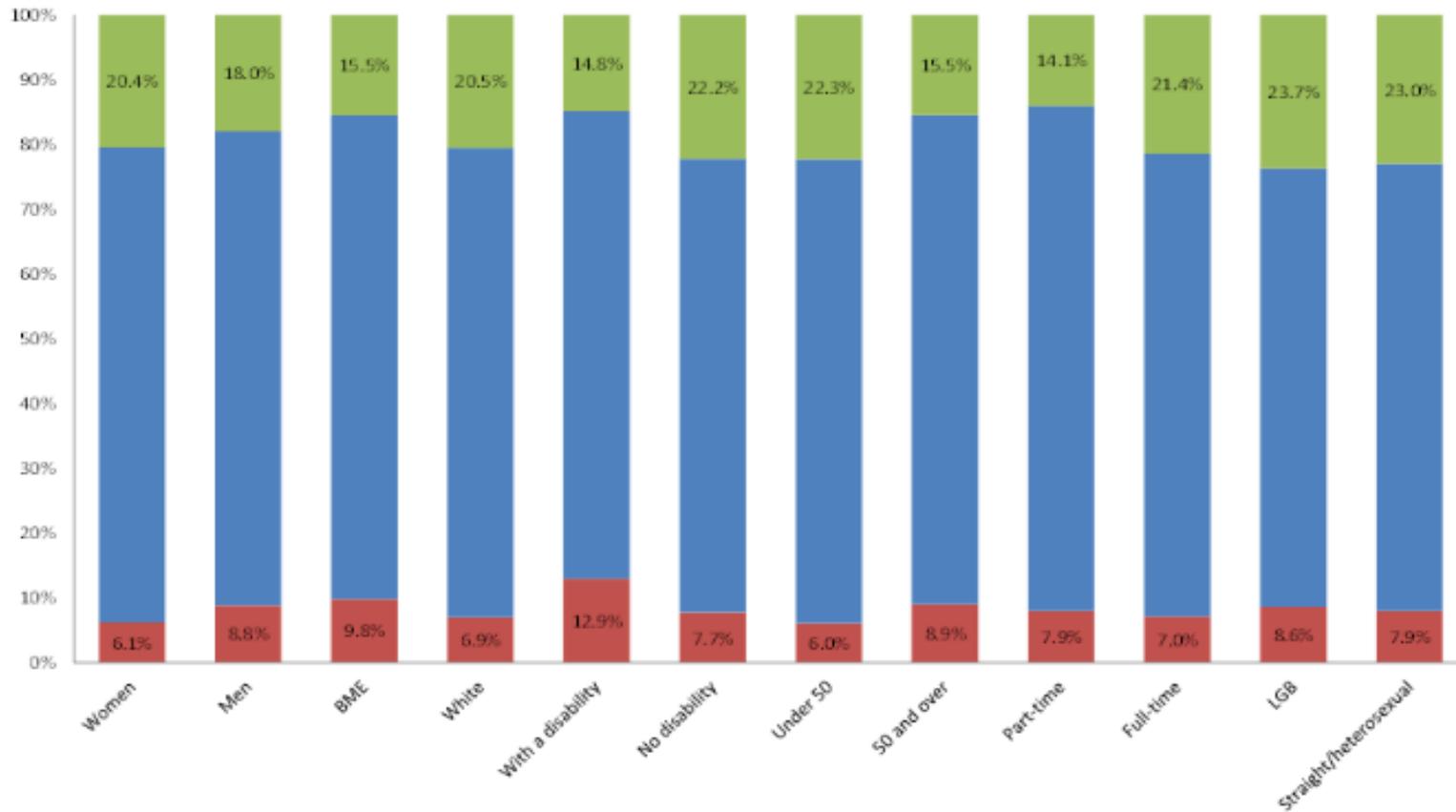
Manager bias?



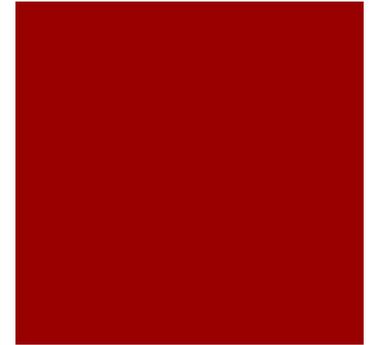
- Prospect – Civil service Trade Union
- 280, 000 civil servants across 17 government departments
- Disabled staff –
 - **Poor performance?**
 - Not disabled 7.7%
 - Disabled 12.9%
 - **Exceeding expectation?**
 - Not disabled 22.2%
 - Disabled 14.8%

Manager bias?

2014/15 Performance ratings - all departments

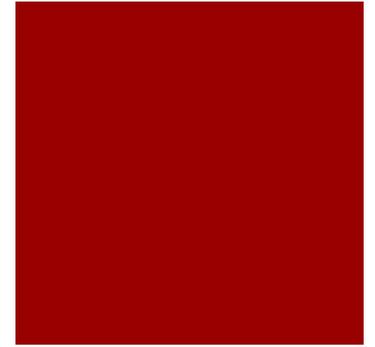


Manager bias?



- Messages to take away?
 - Importance of HR Manager as critical friend
 - Challenge line managers to be explicit as to rationale
 - Demand evidence
 - Beware harsh or disproportionate responses
 - in such circumstances look for additional evidence
 - Particular importance to employer?
 - Particular urgency?
 - Remind the manager of the risk being alone in a witness box with nothing to cling to but their seemingly disproportionate opinion of the employee!!

Creating the business case



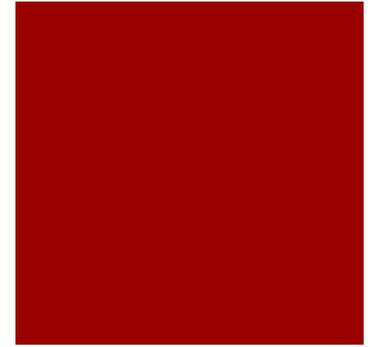
- **Clear evidence of poor performance**
 - Specific rather than general concerns
 - Supported by evidence
 - **Explain significance of the poor performance for the organisation**
 - Provided to employee so can challenge if appropriate.
 - Clear warnings of possible outcome

Creating the business case



- **Clear time scales to improve**
- How long???
- Considerations
 - Length of service?
 - Performance during service?
 - Over promotion?
 - Showing commitment/capacity to improve?
- Follow your procedure and remember ACAS Code
- Consider alternative employment (including demotion where appropriate)

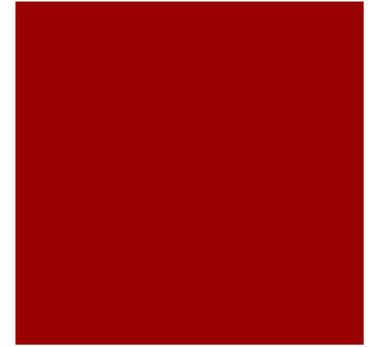
Things to look out for?



- Concealed disabilities
- Revealed during exploration of reasons for poor performance
 - E.g. dyslexia
 - Psychiatric injury (anxiety, depression) – normally well controlled but uncontrolled due to recent personal events
 - Chronic Fatigue Syndrome
- Don't ignore the signs
- Constructive knowledge?

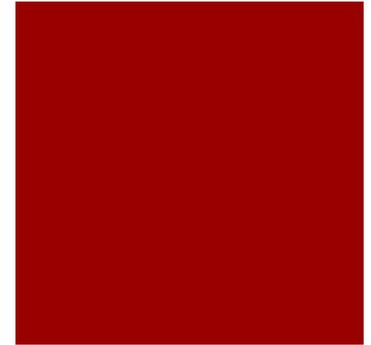
S20 Reasonable adjustments

Is the duty engaged?



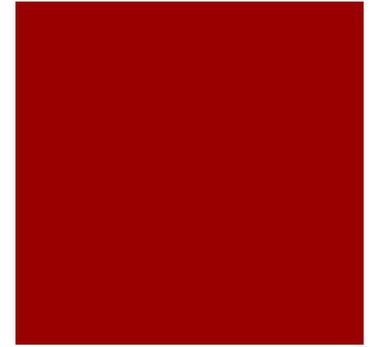
- Provision criterion or practice (PCP) applied by the employer
- PCP places the employee at a substantial disadvantage **because of the disability** in comparison to others without the disability
- **The nature and extent of the disadvantage suffered is known to the employer (or ought to have been known by the employer).**

Constructive knowledge



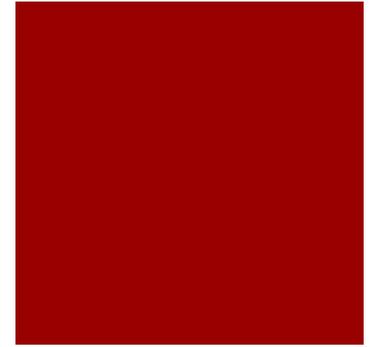
- The burden of proof is on the employer to demonstrate that it did not know and could not reasonably be expected know that:-
 - the employee suffered an impairment which was physical or mental;
 - that that impairment had a substantial and long-term effect; **(i.e. that the employee was disabled)**
 - that a provision, criterion or practice which it applied placed that person at a substantial disadvantage in comparison with persons who did not share that disability, such that steps might be taken in order to prevent it having that effect. **(ie unaware of substantial disadvantage)**
 - Assessed based on how it would have appeared at the time to the employer
 - see ***Donelien v Liberata UK Ltd [2014] UKEAT/0297/14/JOJ Langstaff J P para 5 and para 34***

Performance improvement targets and reasonable adjustments



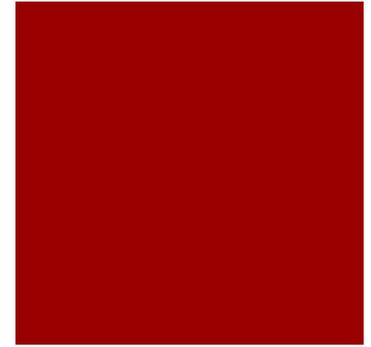
- Obvious target for s20 failure to make reasonable adjustments claim or s19 Indirect discrimination claim
- Ensure that they are required to meet the poor performance concerned.
 - If they are not you will not be able to justify them (for indirect discrimination claims)
- Be prepared to justify each target

Challenging reasonable adjustments



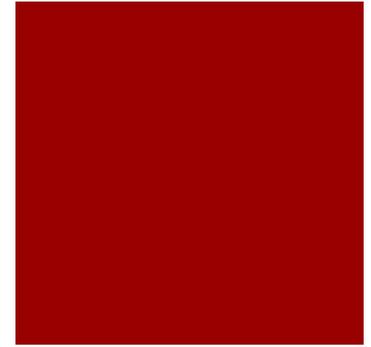
- Examine the circumstances carefully
 - What is the disability?
 - What is the alleged substantial disadvantage?
 - Does this have any bearing on the performance concerned (beware the smoke screen)?
- Is it caused by the disability or an unrelated condition (which is not a disability)?
- Are there any adjustments that will make a difference?
- Likelihood of it making a difference?
- Get medical evidence if you are unclear
- Don't be frightened to challenge the report- consider early legal advice to assist
- Access to Work?

S15 discrimination arising in consequence of disability



- Ingredients
 - Unfavourable treatment (no comparator)
 - Because of something arising in consequence of the disability
 - Employer cannot show the treatment is a proportionate means of achieving a legitimate aim (i.e. objective justification)

S15 discrimination arising in consequence of disability



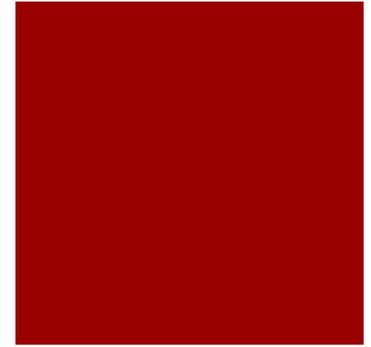
■ Unfavourable treatment?

- Capability/Disciplinary process
- Warnings
- Dismissal

■ Relationship with disability?

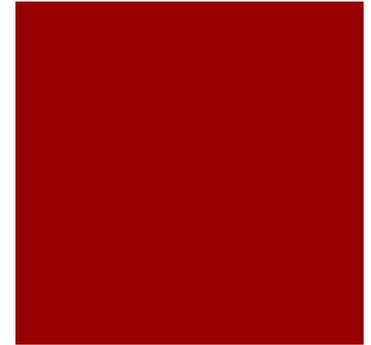
- Consequence of the disability – ill health absence, inability to concentrate, inability to work long hours.
- The more links in the chain between the disability and the reason for the treatment the more difficult to establish s15:
- No need to have knowledge that the something arising which leads to the unfavourable treatment is a consequence of the disability.
- see ***Pnaiser v NHS England [2015] UKEAT/0137/15/LA***

Challenging S15 discrimination



- Identify the links between the disability and the something arising – the more the better
- Have your objective justification lined up
 - Ideally this will fall out of the business case as discussed earlier.
 - And will be reflected in the capability meetings and warning letters.

Managing Performance



- For more information on the topics raised in this presentation:-
- Email Annette.Gumbs@stjohnsbuildings.co.uk
- Call 0161 214 1500

